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Supreme Court U.S.
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No. 09-989

IN THE

Supreme Court of the United States

DWIGHT J. LOVING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

REPLY BRIEF

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ARGUMENT

The narrow issue raised by this death-sentenced Petitioner concerns the court of appeals' acknowledgment of its own failure to properly address an ineffective assistance of counsel claim on direct review in 1994, and then its subsequent compounding of that error by failing to recognize the prejudice to Private Loving in his ability to present extenuation or mitigation evidence in support of his claim almost nineteen years after his original capital court-martial sentencing proceeding. The court of appeals found that "[p]etitioner has produced post-trial material which raises substantial questions about the reasonableness of the investigation upon which our 1994 decision rested." *Loving v. United States*, 64 M.J. 132, 152 (C.A.A.F. 2006). Yet when considering a habeas petition arguing that Loving's 1989 capital sentencing was flawed in a fundamental respect by ineffective representation, the court of appeals ordered an evidentiary hearing, and considered its findings, without any presumption of prejudice arising from the fact that material witnesses had died, become unavailable, or had their memories ravaged by time.

It is because of the court of appeals' acknowledgment that "the documents to support and raise the issue of ineffective assistance of counsel were originally filed at this Court while the case was pending on direct review," 64 M.J. at 146 (footnote omitted), that this is not a run of the mill habeas matter. Rather, the questions presented are at an extreme end of the spectrum of ineffective assistance of counsel cases in which a court has gone so far as to

admit inadequacies in its own earlier appellate consideration of an important issue bearing on a death sentence.

Unlike the government's incorrect characterization of the issues presented, Private Loving is not arguing in this appeal that the lengthy delay in proper consideration of his ineffective assistance of counsel claim entitles him to release. (Opp'n Br. 19.) Instead, Loving points to his inability in a habeas proceeding, delayed for more than a decade due solely to the Court's inadequate review of the issue during direct appeal, to adequately present extenuation or mitigation evidence in order to establish that he was prejudiced by counsel's failure to adequately investigate and present such evidence in his capital sentencing. At the heart of the issues here is Loving's ability to argue life versus death, not punishment versus release.

The jurisdiction of this Court to review the decision of the court of appeals is clear in view of *United States v. Denedo*, 129 S. Ct. 2213, 2219-20 (2009). The issues before the Court in this appeal were argued, preserved, and are ripe for consideration. The government's contentions to the contrary lack merit, and the decision below warrants review and should be vacated in light of the most basic tenets of due process.

A. This Court Has Jurisdiction.

Respondent reads qualifications and limitations into this Court's holding in *Denedo* that, in déjà vue fashion, again foist on the Court an implausibly "parsimonious construction of the word 'relief'," 129 S.

Ct. at 2219, to argue that this Court lacks jurisdiction under 28 U.S.C. § 1259(4) (2006). If the court of appeals' decision to order a *DuBay* evidentiary hearing "conferred a palpable benefit" on petitioner, which it unquestionably did despite the flaw in the relief afforded, then *Denedo* counsels that such "relief" is sufficient for this Court's jurisdiction under Section 1259(4) to attach.

This Court has jurisdiction under Section 1259(4) to review decisions "in which the Court of Appeals for the Armed Forces granted relief." It cannot be denied that the court of appeals' decision to consider anew the strength of extenuation or mitigation evidence to be weighed in capital sentencing, by ordering an evidentiary hearing before a military judge, conferred upon Private Loving "a chance of success on the merits, however slight . . . superior to no possibility at all." 129 S. Ct. at 2220. That hearing, conducted in part over Loving's objections based on the prejudice arising from the loss of critical evidence due to the lengthy passage of time before the hearing, resulted in new findings of fact and conclusions of law which were returned to the court of appeals for consideration.

What matters here is not, as the government contends, that the court of appeals denied Loving's habeas petition. Rather, what matters is the very basis upon which the court of appeals' decision rested—the findings of fact and conclusions of law from a military judge (1) who presided over a newly ordered evidentiary hearing that was fundamentally flawed in design and (2) whose ultimate findings and

conclusions were colored by that flaw to the detriment of Private Loving.

Were this Court to lack jurisdiction in this case, the consequences would be perverse. The court of appeals could order an evidentiary hearing conducted outside the most basic protections of the Constitution, with no means for the ultimately harmed party to contest the validity of that proceeding in this Court. Section 1259(4) should not be read to permit such circumvention of the Constitution. Instead, a well-reasoned reading of the statute, as already instructed by this Court in *Denedo*, is that "relief" as referenced therein "encompasses any 'redress or benefit' provided by a court." 129 S. Ct. at 2219. The court of appeals granted such relief to Loving by ordering a new evidentiary hearing. Unfortunately, the design of that benefit was destined to have repercussions that prejudiced Loving from the moment the benefit was conferred. Surely, if a party is not satisfied with the very "relief" a court provides, appeal rightfully may be taken.

The time for seeking review related to the court of appeals' 2006 decision to order a *DuBay* evidentiary hearing has not long since passed, as argued by the government. (Opp'n Br. 14.) The military judge who followed that court's order to conduct the hearing had an independent opportunity to evaluate and issue findings of fact and conclusions of law subject to a presumption of evidentiary prejudice, because prejudice due to the passage of time clearly had occurred. This he did not do. While the "relief" provided by the new collection and weighing of evidence provided Loving with a chance of

success on the merits, that relief was only "partial" and not "ultimate" or "complete" for the obvious reason that the subject proceeding was flawed in design. But the partial relief provided by the grant and conduct of the evidentiary hearing, as well as the issuance of findings and conclusions therefrom, was enough to be "relief" within the meaning of that term as decided in *Denedo*, and thus to be within the jurisdiction of this Court.

Still further, as to whether only the government has a right to appeal with respect to the relief provided by the court of appeals, Opp'n Br. 13-14, there were potentially *two* aggrieved parties. Private Loving was the other. That the government had no need to appeal because the habeas petition ultimately was denied is of no import here.

Nor was the court of appeals' order to conduct a *DuBay* hearing merely procedural in nature, as suggested by the government. (Opp'n Br. 14.) The *DuBay* judge was ordered to enter findings of fact and conclusions of law concerning each of the following:

> 1. Identify potential sentencing evidence, if any, alleged by the defense that was omitted or incompletely presented at trial.
>
> 2. Address the facts, if any, under (1) that would have been developed through a reasonable investigation by a competent attorney under Strickland. In this regard, what

did trial defense counsel do to investigate information to present in the capital sentencing phase of the court-martial? What information, if any, did the counsel know or should have known that would have triggered an investigation into Petitioner's traumatic background or the omitted or incomplete evidence identified under (1)?

3. What impact did any deficiency in investigating this case, if any, have on tactical decisions made by trial defense counsel (including the decision to use or not to request or to use any expert assistance)? Whether any information identified under (1) could have led to a change in defense counsel's trial tactics in sentencing phase?

4. Were trial defense counsel aware of the information contained in Petitioner's affidavits filed at this Court regarding violence in Petitioner's family home and neighborhood? The *DuBay* hearing will evaluate the credibility and reliability of all factual information Petitioner has filed with this Court to support his habeas corpus petition.

5. The *DuBay* hearing will inquire into any other matters that relate to the issue of performance of trial defense counsel of the duty to

> conduct a reasonable investigation into the background of Petitioner, the omitted or incomplete evidence identified under (1), or any other evidence relevant to the capital sentencing proceeding, in light of prevailing professional norms at the time of the trial.
>
> 6. Whether there is a reasonable probability that, but for the omission [of] information identified under (1) through (5), the result of the sentencing proceeding would have been different? This requires a reweighing of the evidence adduced at trial and in the *DuBay* proceeding to determine this question: Had the panel been confronted with this evidence, was there a reasonable probability it would have returned a different sentence? The test is whether there is a reasonable probability that at least one member of the panel would have struck a different balance thereby not voting for a death sentence?

Loving v. United States, 64 M.J. 132, 152-53 (C.A.A.F. 2006). Thus, while it may be "implausible to conclude that Section 1259(4) confers jurisdiction over every subsequent procedural order," Opp'n Br. 14, this certainly was not an ordinary procedural order.

The government's claim that this Court lacks jurisdiction to hear this appeal cannot be reconciled

with *Denedo*. Moreover, nothing in Section 1259(4) suggests that certiorari review, on Loving's request, is foreclosed due to the type of partial relief that the court of appeals granted nor whether the relief was granted to Loving.

B. Petitioner Preserved His Due Process Claim.

The record below establishes that Loving clearly intended to invoke the Due Process Clause in challenging the failure to apply a presumption of evidentiary prejudice when considering extenuation and mitigation evidence in connection with his habeas petition concerning capital sentencing.

Prior to the court of appeals' order for a *DuBay* hearing to be conducted, Loving's counsel asserted during oral argument that he could not get a full and fair hearing because of the prejudice associated with the passage of time. (Pet. 10.) Again, at the *DuBay* hearing, Loving's counsel argued both before the presentation of witnesses (Pet. 15; C.A. App. 1058) and during closing arguments (Pet. 19; C.A. App. 1694-95) that he suffered prejudice in presenting evidence due to the passage of time.

In his *opening* brief following the *DuBay* hearing, Loving further argued that he was prejudiced due to the passage of time:

> [A]ny discrepancies in the affidavits of Harryl, Wendy, and Gwen and the unavailability of Lucille and Ronnie are simply due to the passage of time. In

> essence rejecting any portion of this information, except the limited portions noted here, would penalize Loving for the delay in conducting the *DuBay* hearing when this Court already held that all of this information, which supported a hearing, was submitted by Loving while on direct appeal and that a hearing should have been granted then.

Petitioner's Brief Following DuBay Hearing at 91, in *Loving v. United States*, C.A.A.F. No. 06-8006/AR. Private Loving also argued:

> Loving continues to assert and does not waive argument that . . . he is essentially being penalized by this Court's failure to order the *DuBay* hearing during the initial mandatory review when *Loving* had submitted the same affidavits and information this Court considered in finally granting the hearing in 2006.

Id. at 97 n.42.

Later, Loving yet again raised the issue that he "has been denied due process of law required by the Fifth Amendment" because he "has been demonstrably prejudiced by the delay, due in no part to his own fault, in affording him a *DuBay* hearing on his claim of ineffective assistance of counsel." Petition for Reconsideration, in *Loving v. United States*, C.A.A.F No. 06-8006/AR at 1 (footnote omitted).

Loving's repeated attempts to have the court of appeals and the *DuBay* judge recognize and address the prejudice he faced are readily apparent. Over and over again, Loving sought to preserve his due process claim on these grounds. This simply is not a case, as the government suggests (Opp'n Br. 15), in which an issue was first raised in a petition for reconsideration or in which a different issue instead was raised.

Still further, to the extent there is any question concerning the adequacy of preservation of Loving's due process claim, all doubt should be resolved in Loving's favor.

"In death cases doubts . . . should be resolved in favor of the accused." *Andres v. United States*, 333 U.S. 740, 752 (1948). "The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (Frankfurter, J. opinion concurring in judgment); *see also Williams v. Georgia*, 349 U.S. 375, 391 (1955). This Court especially has been unwilling to take a restrictive view of the manner in which due process claims may be raised and preserved below, even in non-capital cases. *See, e.g., Braniff Airways, Inc. v. Nebraska State Bd.*, 347 U.S. 590, 598-99 (1954); *Gibbs v. Burke*, 337 U.S. 773, 779 (1949); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 217 n. 3 (1968).

C. This Court Should Exercise Jurisdiction to Hear and Decide the Questions Presented.

This is not a case in which this Court is being asked to resolve unclear issues for the first time on certiorari review, as the government argues (Opp'n Br. 16). The questions presented address the narrow, unusual circumstance when a court of appeals acknowledges a breakdown in the process of direct review, with potentially dire consequences for the aggrieved party.

The court of appeals recognized that "[p]etitioner did not have an adequate opportunity on direct appeal to establish facts in an evidentiary hearing to support his ineffective assistance of counsel claim," *Loving v. United States*, 64 M.J. 132, 148 (C.A.A.F. 2006) despite the fact that "the documents to support and raise the issue of ineffective assistance of counsel were originally filed at [the court of appeals] while the case was pending on direct review," *id.* at 146 (footnote omitted). But that astonishing acknowledgment is of no consequence if the court of appeals subsequently failed to account for the prejudice flowing from the many years between direct review of Loving's case and the appellate court's order to finally conduct an evidentiary hearing. The failure to apply a presumption of evidentiary prejudice in these circumstances presents a narrow but compelling issue worthy of certiorari review.

CONCLUSION

For the reasons given in Loving's petition and this reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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